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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

A.J. ARAVE, WARDEN
Petitioner,

vs.

MAXWELL HOFFMAN,
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Is a defendant convicted at a fair trial or sentenced at a fair sentencing proceeding entitled to any relief if counsel performed deficiently during plea negotiations with the government?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

A. The Assumption of the Existence of Authority by the Circuit Court

The circuit court, after finding deficient performance by counsel, a matter well addressed by petitioner, to whom amicus defers on the matter, assumed it had the authority to direct a particular remedy:

> A habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred."...Where a defendant is deprived of the opportunity to make a reasoned decision about a proffered plea agreement, the proper remedy is reinstatement of the offer of the plea agreement. . . .we order the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the "same material terms" offered in the original plea agreement.
>
> Hoffman v Arave, 455 F.3d 924,942-943(CA9,2006) (emphasis supplied).

Judge Bea, joined by six other members of the court, cogently analyzed the defects of the panel's decision in his opinion dissenting from the denial of rehearing en banc. See Hoffman v Arave,, 481 F.3d 686 (CA 9, 2007)(opinion dissenting from denial of rehearing en banc). Amicus agrees fully with that analysis. But this Court has directed that the parties also address "what, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial," and it is this

important issue to which amicus will focus its attention, for that the judicial branch has the authority to compel the executive branch to take the sort of action ordered in the instant case and cases like it—including the executive branches of state governments—is not self-evident.

B. There Is No Right To A Plea Bargain, and the Reversal Of An Otherwise Valid Conviction and Direction to the Executive Branch to Again Offer a Plea Concession Previously Rejected (Or Not Conveyed to the Accused) Violates Principles of Separation of Powers

The issue presented here generally arises in a different context; namely, where the claim is raised that defendant's counsel failed to convey to the defendant a plea offer advanced by the government, the claim being advanced after conviction at trial. The doctrine has developed that federal courts have the power and proper authority to direct the executive prosecuting agency of both the federal government and state governments to again offer the plea not communicated, and, implicitly in the rulings, to abide by defendant's decision to accept that offer which the government may not now withdraw, though the plea has not yet been entered, upon proof that the defendant "would have" taken the plea offer had he or she been informed of it. But nowhere is the authority to so order about the executive branches of federal and state governments made clear. This is because such authority does not exist; further, where a fair trial or fair sentencing has occurred, no constitutional injury has occurred that requires a remedy.

(1) There is no right to a "well-negotiated" plea

The right protected by due process, and by the Sixth Amendment guarantee of counsel in criminal prosecutions applicable to the States through the due process clause, is the right to a fair trial. And so this Court has found that where counsel's performance is so deficient as to justify a finding that but for that performance the accused would not have given up his or her right to a fair trial by pleading guilty, that plea may be set aside. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The question here, however, concerns the converse, and because the very right protected by the constitution is the right to a fair trial, no wrong that requires remedy can be said to occur when the accused is convicted at a fair trial, even where he or she receives poor counsel regarding a possible plea (or where counsel fails to convey a plea offer).

This Court has said clearly that the right protected by the effective-assistance component of the right to counsel is the right to a fair trial:

> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.
>
> Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 2063 (U.S.1984)

Counsel is crucial to our adversarial system precisely because "access to counsel's skill and knowledge is

necessary to accord defendants the 'ample opportunity to meet the case of the prosecution" to which they are entitled." Strickland, 466 U.S. 6 at 685, 104 S.Ct. at 2063. Where counsel's performance both before and during trial was adequate under Strickland to provide that ample opportunity to meet the prosecution's case, the inquiry should be at an end, the defendant having received that assistance the Constitution affords to ensure the trial was a fair adversarial search for the truth involved in the matter.

The precise issue here—whether "deficient" performance in plea negotiations, such as by poor advice, or the failure to convey to the accused an offer made by the prosecution is mooted by a conviction at a fair trial—has been addressed by lower courts on several occasions, with conflicting results. Representative of those courts answering in the negative (and assuming power to order the executive officials to again offer concessions for a plea, concessions that are well-nigh unwithdrawable, and which, in any event, cause the overturning of a conviction had at a fair trial) is United States v. Day 969 F.2d 39, 45 (C.A.3,1992). There the court cited to decisions by other circuits and state courts (see 968 F.2d at 44, and fn 7) to conclude that "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." See also such cases as Nunes v Mueller, 350 F.3d 1045 (CA 9, 2003) to the same effect.

This ipse dixit will not do, and is inconsistent with Strickland. It is based upon principles of professionalism—"[i]t would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards," see United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438

(C.A.N.J., 1982)—with are conflated with the Sixth Amendment guarantee. But the Court does not sit to enforce rules of professional conduct. And these decisions not only, as will be argued, order remedies inconsistent with principles of separation of powers and federalism, but require resolution of factual questions almost impossible to resolve with any precision ("Because we conclude that prejudice is theoretically possible, the question becomes whether Day alleges sufficient prejudice in fact, which requires consideration of whether Day would have accepted the alleged plea offer and whether the district court would have approved it," Day, supra, 969 F.2d at 45).

The contrary to this proposition (itself contrary to Strickland) is cogently and powerfully stated by Judge Easterbrook in United States. v. Springs, 988 F.2d 746, 749 (CA 7,1993):

> Not every adverse consequence of counsel's choices is "prejudice" for constitutional purposes. "[A]n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. 364, ----, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993)....The guarantee of counsel in the sixth amendment is designed to promote fair trials leading to accurate determinations of guilt or innocence. The Constitution does not ensure that lawyers will be good negotiators, locking in the best plea bargains available....The "prejudice" component of ineffective assistance "focusses on the question whether

> counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair.... Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Fretwell, 506 U.S. at ----, 113 S.Ct. at 844. Prosecutors need not offer discounts and may withdraw their offers on whim. Defendants have no substantive or procedural right to bargain-basement sentences. Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) (emphasis supplied).

And there are decisions reaching the opposite conclusion from Day and similar decisions. In State v Greuber, 165 P.3d 1185, 1189 (Utah, 2007), to which amicus will return, the court held that the defendant there could not have been prejudiced by the performance of his counsel during plea negotiations "because he received a trial that was fair—the fundamental right that the Sixth Amendment is designed to protect." Because there "is no right to a plea offer or to a successful plea bargain," the defendant has lost not a right but an "opportunity, one which may present itself to some defendants but not to others." When a defendant has been then convicted at a fair trial, "he has not been deprived of a 'substantive or procedural right to which the law entitles him.'" Greuber, at 1189-1190, quoting Lockhart v Fretwell; see also cases cited at fn 5.

Precisely so. This Court should hold that no "effective assistance" inquiry regarding plea

negotiations is pertinent after a conviction resulting from a fair trial.

(2) No "remedy" can be imposed for deficient performance during plea negotiations that does not interfere with principles of separation of powers

There is, as observed by Judge Easterbrook in Springs and stated by this Court in Mabry v Johnson, no right to a negotiated plea. Executive-branch prosecuting authorities are not required to make any concessions in order to obtain a guilty plea, and even if they do so, and the defendant accepts the terms, that offer may be withdrawn until such time as the plea has been accepted by the court, or detrimental reliance of a concrete sort—such as the giving of testimony against an accomplice—has occurred. See Mabry; United States v Springs, supra. The decision to charge and the choice of charges are executive decisions, with which the judiciary may not interfere nor superintend. Review of these decisions is not, for example, for abuse of discretion, but only for abuse of power; that is, as to whether the prosecuting authority has exercised its power unconstitutionally by engaging in selective prosecution based on invidious discrimination. See e.g. United States v. Severino, 316 F.3d 939, 955 (CA 9, 2003)("'separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right.' United States v. Palmer, 3 F.3d 300, 305 (9th Cir.1993). Indeed, absent such a showing, 'we have no jurisdiction to review prosecutors' charging decisions ....' United States v. Oakes, 11 F.3d 897, 899 (9th Cir.1993)"); People ex rel. Leonard v. Papp, 386 Mich. 672, 684, 194 N.W.2d 693, 699 (Mich. 1972) ("For the judiciary to claim power to control the

institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers").

The Ninth Circuit here, as other courts have done in related situations, has determined that it should order relief so as to "put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred." But this is not possible, for that "position" included a position occupied by the State—a pretrial posture, where the State was willing to exchange the expense and uncertainty of a trial for a certain conviction, albeit on lesser charges. That ship has sailed, and cannot be recalled. As the Utah Supreme Court pointedly observed in Greuber, once the offer has not been taken, and the defendant has received "his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity," for the "balance of risks and incentives on both sides that existed prior to trial" cannot be recreated, see Greuber, 165 P.3d at 1190—and the attempt to do so engaged in here itself violates constitutional principles of separation of powers (and here, because habeas corpus is involved, federalism).

The prosecution was required to make no plea offer in the first place (as is true in similar cases, including those where the failure of counsel is to inform the accused of the plea offer). Having made it, even if defendant accepted it, before its formal acceptance by the court the prosecution was free to withdraw it, even on, as Judge Easterbrook noted in Spring, a "whim," so long as some detrimental reliance in the form of some performance had not occurred. But the Ninth Circuit here, and it is far from alone in this procedure, requires the state executive prosecuting officials to offer the bargain

again, something they have no interest in doing, implicitly requiring them not to withdraw it now though as an initial matter they were free to! (some courts allow the prosecution to withdraw the offer on proof the withdrawal is not "vindictive," see e. g. Turner v State of Tennessee, 940 F.2d 1000 (CA 6, 1991), in which case there will be a second trial for no reason whatever, and which is inadequate to protect the government's interests, which simply are not the same after the trial—which the plea offer sought to avoid—has been had). These courts thus direct the manner in which the executive branch is to act—requiring a plea offer, and requiring it not be withdrawn if accepted by the defendant—when those decisions belong to the executive branch of government, and those orders could not be issued by a court in the first instance. This Court should firmly set its face against this encroachment on executive-branch authority, and, in habeas cases, the authority of the several States.[1]

C. Conclusion

It is difficult to state the matter more trenchantly than did the Utah Supreme Court:

> The unavailability of a rational remedy for ineffective assistance of counsel in the rejection of plea offers illustrates the flaws inherent in treating identically defendants who have received fair trials and those who had forgone trials and pled guilty. Judges

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1. The rule expressed by the 9th and other circuits would even prevent prosecuting authorities from placing time limits on plea offers, for if the offer was not conveyed by counsel to his client in a timely fashion, that "failure" would prevent the prosecution from withdrawing the offer. This state of affairs should not exist.

> have long held themselves apart from the complex negotiations that characterize the plea bargaining process and have instead focused on their duty to ensure that defendants receive the fair trial to which they are constitutionally entitled.
>
> 165 P.3d at 1190.

The defendant received a fair trial, whatever the performance of his counsel during plea negotiations. To vacate his conviction and sentence and require that the State offer a plea it is no longer wishes to violates separation of powers and federalism principles. There is no constitutional wrong to be righted here, and an invasion of the executive authority of the State is not proper.

Conclusion

WHEREFORE, this Court should reverse the 9TH Circuit Court of Appeals.

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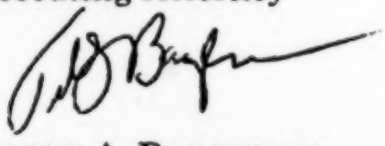

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